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BEFORE THE BOARD OF OIL, GAS, AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION,

Petitioners,

v.

DIVISION OF OIL, GAS, & MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,

Respondent/Intervenors.

PERMITTEE'S MEMORANDUM ON SCOPE OF REVIEW

Docket No. 2009-019

Cause No. C/025/0005

Alton Coal Development, LLC ("**Alton**") by and through counsel and pursuant to the Board's Minute Entry dated December 17, 2009 submits this MEMORANDUM ON SCOPE OF REVIEW and related issues for the hearing in the above-captioned formal adjudicative proceeding before the Utah Board of Oil, Gas & Mining ("the Board"). Under the statutory scheme applicable to this hearing, the Board has discretionary authority to define the scope and course of these proceedings, and important practical considerations warrant a hearing closely focused on the Coal Hollow Mine permit application and the record of permit proceedings before the Utah Division of Oil, Gas and Mining ("Division"), including the State Decision Document and Application Approval dated October 15, 2009, proceedings from the informal conference on the permit, and documents submitted to and generated by the Division in the course of its technical review if the mine permit application.

STATEMENT OF FACTS

The permit application for the Coal Hollow Mine was submitted to the Division on June 27, 2006. After Alton revised the application and submitted additional information, the Division found the application to be administratively complete on March 14, 2008, and notice of the complete application was published in the Southern Utah News. Relevant state and federal agencies were also notified, as was the Southern Utah Wilderness Alliance ("SUWA"). The public notice provided for a period of public comment and opportunity to request an informal conference before the Division. Thirty-three comments were received before the comment period closed, and three parties requested an informal conference. Because the Governor's Resource Development Coordinating Council had listed a later incorrect ending date for public

comment, the Division accepted comments and conference requests through May 22, 2008, when another 19 comments and three conference requests were received.

The Division's Director, John Baza, presided at an informal conference in the town of Alton Utah on June 16, 2008. Forty-seven members of the public attended, and twenty individuals made oral statements. SUWA submitted written comments but did not appear at the Alton conference. Following an extended period for written comments, the Director issued the Division's formal conference findings and order on July 18, 2008.

The Division initiated its technical review of the permit application upon finding the application to be administratively complete, and issued its first technical analysis of the application on September 2, 2008. Alton responded to the technical analysis providing the Division with additional and revised permit materials, on December 22, 2008. A second technical analysis requiring additional explanation and information was issued on April 20, 2009, and Alton responded with additional information. The Division's final technical analysis and findings that all permit application criteria were satisfied was issued on October 15, 2009. At the same time, the Division issued its Cumulative Hydrologic Impact Assessment ("CHIA") for the project, and approved the permit application. These decision documents are set forth in the State Decision Document and Application Approval dated October 15, 2009.

INTRODUCTION AND BACKGROUND OF STATUTORY SCHEME FOR PERMIT REVIEW

The permitting of surface coal mining on private lands in Utah under the Utah Coal Mining and Reclamation Act ("UCMRA") is the primary responsibility of the Division, subject to a hearing by the Board on the Division's final decision on a permit. See Utah Code Ann. §

40-10-14-(3) ("a hearing may be requested on the reasons for the final determination"). The Division has the lead responsibility to review a permit application, issue written findings on the permit and administer and enforce the conditions of the coal mining permit. Following review of the permit application, provision of an opportunity for public comment and an informal conference under Utah Code Ann. § 40-10-13 and entry if necessary findings, the Division may grant, deny or modify a permit. See Utah Code Ann. § 40-10-11(1)(a)(i), ("after a complete . . . application and plan is submitted to the division, as required by this Chapter and the public is notified and given an opportunity for hearing as required by § 40-10-13, the division shall grant, require modification of, or deny the permit application"); Utah Code Ann § 40-10-11(2) providing that the Division must make written findings that the application meets the UCMRA's statutory criteria for approval. If an informal conference has been held, the Division is required to grant or deny the permit and state the reasons therefore within 60 days of the conference. Utah Code Ann. 40-10-14 (1). If the Division grants the permit, it is in full force and effect based on the Division's approval without the need for further Board action. See Utah Code Ann. § 40-10-14(4). Once the Division acts on a permit application, if a hearing is timely requested, the Board is responsible for conducting a hearing "on the reasons for the final determination" by the Division and based on those reasons, granting or denying the permit in whole or in part.[1] Utah Code Ann. § 40-10-14(13). The Board does not substitute its judgment for that of the

[1] UCMRA is Utah's statute implementing § 503 of the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1253. Pursuant to § 503 SMCRA, Utah has assumed primary responsibility from the federal government for regulating the surface effects of coal mining within the state. See 30 C.F.R. 730-733. In most cases, the Utah provisions mirror those of SMCRA.

Division, but rather conducts its hearing to review the Division's reasons for making its decision on the permit. Id.

When conducting its hearings on the reasons for the Division's permitting decision, the Board is instructed by the Legislature to observe formal adjudicatory procedures consistent with the Utah Administrative Procedure Act ("UAPA") and protect due process rights. Utah Code Ann. § 40-10-6.7(2). The hearing should conform to the Board's general rules of practice and procedure. Utah Code Ann. § 40-10-14(3). Unless specifically adopted, the rule, formalities, and procedures of common civil litigation before the courts are inapplicable to the Board's hearings. *See Entre Nous Club v. Toronto*, 287 P.2d 670, 672 (Utah 1955); *Nelson v. Dep't of Empl. Sec.*, 801 P.2d 158, 162-63 (Utah Ct. App. 1990).

The differences between the Division's and Board's roles in approving and reviewing a coal mining permit decision are also apparent from the amounts of time the Utah coal program allots to each entity to perform its tasks. The Division may take up to one year to review the permit application package, with time spent by the applicant in revising the permit application not counted against the Division's allotted time. R645-300-131.114. If an informal conference is requested on a permit application, the Division is required to issue findings granting or denying the permit within 60 days after the conference. Utah Code Ann. 40-10-14(1). If a hearing on the approved permit is requested before the Board, it must hold a hearing within 30 days, and issue its decision 30 days thereafter. Utah Code Ann. 40-10-14(3). Clearly, a volunteer board meeting Division with its full-time staff including both technical and clerical specialists. That is not what is envisioned by the Board's review of the Division's "reasons for

the final determination." The Board does not start the permitting process anew, it merely determines whether the Division has acted according to the laws and regulations.

The statutory descriptions of the decision to be made by either the Division or Board on a permit application also illuminate their different fact-finding responsibilities. The Division is required to make its decision to grant, require modification of, or deny the permit application. Utah Code Ann. § 40-10-11(1)(a)(i). The Division's authority to approve a permit is constrained to those permit applications that affirmatively demonstrate that all of the statutory criteria are satisfied. Id. at 40-10-11(2). Further, the Division is authorized to consider public comment and provide an opportunity for an informal conference on the permit application. Utah Code Ann. 40-10-13(2).

By contrast, if the Division approves a permit, the Board is authorized to hold a hearing on "the reasons for the final determination" by the Division. Utah Code. Ann. § 40-10-14(3). The Board, after its hearing, shall issue its decision "granting or denying the permit in whole or in part and stating the reasons." Utah Code Ann. § 40-10-14(3). The Division is therefore charged with creating a written record documenting how the permit application provides the necessary information to demonstrate compliance with the statutory and regulatory standards. The Division issues a final determination and the approved permit then has full force and effect. If a hearing is requested after the Division has reached its final decision, the Board on review may grant or deny the permit, in whole or in part, but it is not empowered to require modification of the permit application. The Board need not document compliance with all of the regulatory criteria, as the Division must, but is only required to provide a written order stating the reasons for its action after the hearing. Id.

The Board's role under this statutory scheme is different from the hearings it conducts under the Utah Oil and Gas Conservation Act, Utah Code Ann. 40-6-1 et seq. For example, when conducting hearings on oil well spacing or pooling requests, the Board has the initial fact-finding responsibility, and the Division's role is to provide its analysis and recommendation to the Board. See Utah Code Ann. §§ 40-6-6, 40-6-6.5; 40-6-8. The Board and the Division receive the technical information supporting the request at the same time. In reaching a decision, the Board refers to criteria and standards specifically set forth in the Board's enabling legislation. Id. Presentation of detailed technical findings for the first time before a government agency is both expected and essential under these circumstances, and the Board hears the evidence as a primary fact finder. In contrast, the statutory scheme for coal mining permits requires the Division to perform initial fact-finding, take an active role in determining the contents of the permit application, provide an opportunity for public comment and hearing on the application and grant, deny or modify the permit. As an appellate-type body, reviewing the reasons for the Division's final determination, the Board, acting in a much shorter time frame, makes its decision after the permit is approved and application package is already assembled, revised, and evaluated.

ARGUMENT

I. THE BOARD SHOULD CONDUCT ITS HEARING BY FOCUSING CLOSELY ON THE PERMIT APPLICATION AND RELATED STUDIES AND DOCUMENTATION

The Board should regulate the course of the hearing as an administrative appellate review body to focus closely on the decision of the Division, together with whatever studies, public comments, and other information were available to and used by the Division to reach its decision

to grant the permit. This approach is dictated by the nature of the Board's role in the decision making scheme laid out in the UCMRA. The primary functions of gathering and evaluating the information on which the permitting decision rests belongs to the applicant and the Division, and the governing statutes and regulations provide ample time for that process, and opportunity for both the Division and the applicant to learn and address concerns of the public and potentially adversely-affected parties. See Utah Code Ann. §§ 40-10-11; 40-10-13; 40-10-14.

Reference to the procedures of ordinary civil litigation to discern scope of review is inapplicable in this administrative setting. The administrative process relies on the presentation of data by the applicant and sound technical analysis and decision-making, by the Division. The administrative record of this process is reflected in the approved permit application, the State Decision Document and Application Approval dated October 15, 2009 and related public comment and technical analysis. Because that data presentation, technical analysis and decision record represent the culmination of a long and detailed process, they are appropriately the core of the evidence before the Board on review of the decision. The exhibits and testimony admitted by the Board in its hearing should be closely related to that process, with deviations permitted only when the Board determines that the proffered evidence will be helpful in permitting the Board to discern "the reasons for the decision."

The Board's Orders dated August 9, 2007 and September 5, 2007 on the scope of review issued prior to its anticipated second substantive hearing for the Lila Canyon Mine Permit are

consistent with this approach.[2] After briefing by the parties (including SUWA, which argued for a narrow, on-the-record review) the Board examined the statutory scheme and concluded that a categorical bar to all evidence not contained in the Division's administrative record could not be justified under Utah law. The Board noted, however, that the consideration of what evidence to admit was a case-by-case determination, and concluded in light of the allegations of error advanced by SUWA, and the permit's unique administrative history, that some amount of additional documentary evidence beyond that compiled by the Division would be admissible.[3] The Board further relied on Utah Admin. Code R641-108-900 which provides that "upon the motion of a party and for good cause shown, the Board may authorize such manner of discovery . . . . provided by the Utah Rules of Civil Procedure." September 5, 2007, Order at 2. The Order further considered "good cause" as vesting the Board with broad discretion, citing *Jackson v. Kennecott Copper Corp.*, 495 P.2d 1254, 1255 (Utah 1972). Id. at 7. Therefore, in this matter, unless otherwise provided with "good cause," the Board should limit its review primarily to the approved permit application, the State Decision Document dated October 15, 2009, the Division's technical analysis of the permit and public comment on the application received by the Division.

This approach is not incompatible with UCMRA's due process requirement that the hearing provide an opportunity to examine any exhibits presented, and to cross-examine any

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[2] *SUWA v. Division of Oil, Gas and Mining, et al.*, Docket No. 2007-015, Cause No. C/007/013-LCE07 (the parties reached settlement in this matter prior to hearing and the Orders were not ultimately applied). (Referred to herein as Lila II.)

[3] Ultimately, only three types of evidence beyond the Division's record were produced and proffered: (1) expert witness testimony regarding the adequacy of the permit applications hydrological descriptions; (2) testimony of Division staff explaining their reasons for reaching certain required conclusions in reviewing the application; and (3)

witness. Utah Code Ann. § 40-10-6.7(b). This restatement of the requirements of due process does not mandate introduction of witnesses or exhibits, but merely assures parties of an opportunity to examine and confront whatever might be proffered. Similarly, the scope of review outlined above is not inconsistent with the Board's rule at R641-101-200 entitling a party to introduce evidence, examine witnesses and otherwise participate in the hearing. A close focus on the permit application and related documents merely assures that the scope of exhibits and testimony admitted matches the scope of the Board's role in reviewing the Division's extensive fact-finding and decision-making process already complete without unnecessarily and inefficiently recreating it.

In pointing out that UCMRA's statutory scheme contemplates Board review closely focused on the permit application package and decision documents, Alton does not propose a strict "on-the-record" review as adopted by the Board in the first hearing regarding the Lila Canyon Mine Permit.[4] Nor does Alton propose the strict limits imposed on extra-record evidence that are applied by federal district courts reviewing agency action. The argument for a "closely-focused" scope of evidence (either admissible or discoverable) is rooted in a pragmatic assessment that the body of documentary evidence submitted to or prepared by the Division in the course of its analysis is sufficiently probative of the reasons for the Division's decision. To the extent that additional evidence (witness testimony, in particular) can assist the Board in

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a search of staff members informal files and e-mails for information not contained in the Division's designated record.

[4] *SUWA v. Division of Oil, Gas and Mining, et al.*, Findings of Fact, Conclusions of Law and Order, filed December 14, 2001, Docket No. 2001-027, Cause No. C/007/013-SR98(1).

understanding and evaluating the Division's reasons for approving the permit, that evidence should be admissible.

The Board should reject discovery requests or proffers of evidence that seek to recreate the extensive and lengthy data collection and analysis contained in the permit application and forming the basis for the Division's decision. If, as petitioners claim, the data presently available do not support the conclusions reached by the Division, that lack of support will be apparent as a missing connection between the facts found and the choices made under the standard of review proposed below. In that circumstance, Board could remand the permit to the division, which could then require Alton to supply, and the Division's technical staff to evaluate, the missing data. Through the public participation process available before the Division, SUWA could, if it chose, present its conflicting data and conclusions where they could be evaluated in the context of the entire permit application.

II. DISCOVERY AND INTRODUCTION OF NEW EVIDENCE, IF ANY, SHOULD BE PERMITTED ONLY IF NECESSARY TO EXPLAIN THE CONCLUSIONS AND ALLEGED ERRORS IN THE PERMIT APPLICATION AND RELATED MATERIALS CONSIDERED BY THE DIVISION

The Board should exercise its discretion to closely limit any discovery it allows to situations where: (i) the requesting party is able to demonstrate that the information sought can be obtained efficiently and quickly; (ii) it will help the Board to discern and evaluate the reasons for the Division's decision; and (iii) only on whether the Division acted arbitrarily and capriciously in reaching its decision. Discovery before administrative agencies is a matter of the agency's discretion, not a matter of right. *Petro-Hunt, LLC v. Dep't of Workforce Serv.,* 197 P.3d 107, 111-12 (Utah Ct. App. 2007) (noting that appellant could have challenged the agency's

denial of formal discovery as an abuse of discretion, but instead raised only a constitutional challenge). It is not a deprivation of due process, or a breach of fundamental fairness, to deny discovery in an administrative hearing even if the same discovery would be permitted in civil litigation. Id. at 112. The requirements of UAPA that formal adjudication should provide opportunity for discovery are satisfied when an agency provides for discovery in its rules. *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344, 353 (Utah 1996). This Board has provided that by rule that discovery is available only if the Board orders it upon a showing of "good cause."[5] Utah Admin. Code R. 641-108-900.

For the purpose of evaluating possible discovery requests, good cause is rooted in showing that the sought-after evidence will be helpful to the Board's evaluation of the reasons for the decision. Further discovery requests that appear to duplicate information in the permit application or related documents, or seek to re-create the data collection and analysis already completed, are sufficiently outside the statutory scheme for this hearing that they should be denied. Alton will oppose, and the Board should deny, attempts to delay this proceeding by seeking to develop evidence through discovery that could as readily have been developed and presented in the Division's public comment and informal conference process. The inquiry is not whether the Board would or would not act differently if it were to independently go through the entire permitting evaluation, rather, it is limited to whether the Division acted arbitrarily and capriciously in the manner that it approved the permit. Finally, the Board should weigh the

[5] Note that Lila II did not attempt to define "good cause in this context because all parties had moved for some amount of discovery."

efficiency and timeliness of its own hearing in ruling on discovery requests, and deny or limit those requests that will substantially delay a decision or unduly burden any party.

The Utah Supreme Court has found that substantially similar rules applied by an agency to limit discovery satisfy the requirements of due process of law even when the result is that no discovery is permitted. The agency adjudicating the *Petro-Hunt* matter cited above had provided, by rule, that formal discovery is only "rarely necessary" and would only be granted if five elements were present: (1) informal discovery methods were inadequate; (2) no less costly or intimidating method is available; (3) discovery would not be unduly burdensome; (4) it is necessary to allow the parties to properly prepare for a hearing; and (5) no unreasonable delay would result. *Petro-Hunt LLC*, 197 P.3d at 111-112. Like these examples, the discovery standards proposed above ensure that any requested discovery serve the legitimate purpose of aiding the Board's inquiry and understanding of the issues without unnecessarily burdening parties or delaying a final decision.

The need for formal discovery is diminished by the availability of informal discovery as recognized in *Petro-Hunt*. The Division has made all of the incoming, internal, and outgoing documents connected to the permit application available to the public on the internet. As a government agency, the Division is also subject to the Government Records Access and Management Act ("GRAMA") that compels release of most public records. Use of simple information requests, at least for documentary evidence, offers a more rapid means of obtaining information that for whatever reason is missing from the publicly-available materials, and the Board is justified in making the failure of these informal methods a prerequisite for obtaining a formal discovery order upon a showing of good cause.

III. THE BOARD SHOULD AFFIRM THE DIVISION'S FINDINGS AND CONCLUSIONS UNLESS THEY ARE ARBITRARY AND CAPRICIOUS OR CLEARLY ERRONEOUS

Among the questions left explicitly unanswered in the second Lila Canyon Mine permit hearing was what standards of review the Board should apply to the Division's findings and conclusions. August 9, 1997 Order at 14-15. Neither UCMRA nor UAPA specifies the degree of deference a reviewing agency should afford to the subordinate agency's decision, suggesting that the matter is committed to the reviewing agency's discretion. The statutory scheme for evaluating a coal mine permit application places responsibility for data collection and analysis early in the decision making process, with the Division taking active steps to assure complete and accurate information in the permit application. Therefore, the Board is justified in according deference to the Division's findings and conclusions in this hearing on the reasons for the decision. This Board is certainly empowered and qualified to decide detailed technical questions when required by statute (e.g. oil and gas well spacing, pooling, and unitization requests). However, the UCMRA makes the Division responsible for initial review of the permit application, its conformity with legal standards, and for reaching a final decision that has full force and effect. In recognition of the Division's detailed role under the statutory scheme, and in the interest of avoiding duplicated effort and conflicting interpretations, the Board should defer to the Division's findings unless they are arbitrary and capricious, clearly erroneous, an abuse of discretion, or otherwise not in accordance with law.

The arbitrary and capricious standard of review is appropriate for this hearing and it gets to the heart of the Board's role in evaluating the reasons for the Division's decision. Review under this standard requires a searching inquiry into whether there is "a rational connection

between the facts found and the choices made" by the Division. *See Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Utah courts likewise define the arbitrary and capricious standard of review in administrative proceeding as a test of "reasonableness." *See Bourgeous v. Dept. of Commerce*, 41 P.3d 461, 463 (Utah Ct. App. 2002). There would be little reason to inquire into the Division's reasons for its decision if the Board would thereafter substitute its judgment for that of the Division. The arbitrary and capricious standard is appropriate to this Board's hearing on the reasons for the Division's decision because it does not contemplate that the Board would re-evaluate the facts and reach a new, substitute decision. While deferential to the Division, the arbitrary and capricious standard in nevertheless rigorous: "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Alton respectfully recommends that the Board adopt an arbitrary and capricious standard of review to determine whether the Division's reasons for its decision were rationally connected to the facts found.

IV. ALL BURDENS OF PROOF REST WITH PETITIONERS

Neither UCMRA nor UAPA specify which party, if any, bears the burden of proof in the Board's hearing on the reasons for the Division's decision granting the permit application. The general rule in administrative law is that the party bringing an action has the burden of proving its entitlement to the relief it seeks. See 2 Am. Jur. 2d Administrative Law § 355 (database updated May 2009). Because the Sierra Club *et al.* have petitioned the Board for a hearing, and seek specific relief either denying or remanding the permit application, these parties must prove

that the Division's reasons for approving the permit were arbitrary and capricious, or that its factual findings were clearly erroneous.

While state law is silent as to burden of proof, the governing federal regulations under SMCRA, administered by the federal Office of Surface Mining, Reclamation, and Enforcement explicitly place the burden of proof on the petitioner seeking reversal. Under the Federal rules applicable to state-administered programs such as Utah's, when a hearing is requested "[t]he burden of proof at such hearings shall be on the party seeking to reverse the decision of the regulatory authority." 30 C.F.R. § 775.11(b)(5) (2008). Therefore, since Sierra Club *et al.* seeks reversal of the Division's decision, it must carry the burden of proving that the decision was arbitrary and capricious, clearly erroneous, or otherwise not in accordance with law.

RELIEF REQUESTED

Alton Coal Development, as the holder of a valid permit for the Coal Hollow Project, and a party to this proceeding, respectfully requests that the Board enter an order setting forth the following guidelines and parameters for the hearing requested by the Sierra Club *et al*:

1. Evidence admissible at the hearing will be closely focused on the permit application and other materials used or produced by the Division in the course of its review, including technical analyses, public comments, transcripts of informal conferences, and comments of other public agencies contained in the Division's record of its review.

2. Exceptions to #1, including discovery requests, will be permitted only on showing good cause in light of necessity, potential for delay, burden and expense, and value to Board's decision making task.

3. Pursuant to the statutory scheme of the Utah Coal Mining and Reclamation Act, the Board will affirm the Division's decision unless it is arbitrary and capricious, clearly erroneous, or otherwise not in accordance with law.

4. At the hearing, Petitioners have all burdens of proof, including burden of going forward with prima facie case, producing evidence, and the burden of persuading the Board.

RESPECTFULLY SUBMITTED this 29th day of December, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2009, I mailed a true and correct copy of the foregoing PERMITTEE'S MEMORANDUM ON SCOPE OF REVIEW via e-mail and United States mail, postage prepaid, to the following:

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